

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-2057

To be Argued by
RHONDA AMKRAUT BAYER

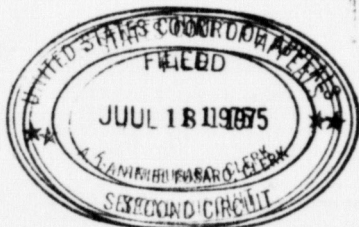
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA ex rel. :
LARRY JULIUS GIBBS, :
Appellant, :
-against- :
LEON J. VINCENT, Superintendent, :
Appellee. :
-----X

B
w/pls

BRIEF FOR APPELLEE

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-2097

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RHONDA AMKRAUT BAYER
Deputy Assistant Attorney General
of Counsel

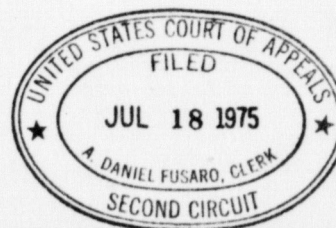


TABLE OF CONTENTS

	<u>Page</u>
Questions Presented.....	1
Statement.....	2
Statement of Facts.....	2
Prior Proceedings.....	19
A. State.....	19
B. Federal.....	19
POINT I - THE PRE-TRIAL IDENTIFICATION PROCEDURE DID NOT IRREPARABLY TAINT IN-COURT IDENTIFICATIONS OF APPELLANT AT TRIAL.....	20
POINT II - THE ADMISSION OF IDENTIFICATION TESTIMONY BY PERRY AND ALSTON, WHO DID NOT TESTIFY AT THE SUPPRESSION HEARING WAS NOT CONSTITUTIONAL ERROR.....	28
Conclusion.....	30

TABLE OF CASES

	<u>Page</u>
<u>Chapman v. California</u> , 386 U.S. 18 (1967) reh. den. 386 U.S. 987 (1967).....	26
<u>Gilbert v. California</u> , 388 U.S. 263 (1967).....	28
<u>Harrington v. California</u> , 395 U.S. 250 (1969).....	26
<u>Henry v. Mississippi</u> , 379 U.S. 443 (1965).....	29
<u>Neil v. Biggers</u> , 409 U.S. 188 (1972).....	20, 21, 22, 28
<u>Schneble v. Florida</u> , 405 U.S. 427 (1970).....	26
<u>Simmons v. United States</u> , 390 U.S. 377 (1968).....	27
<u>Stovall v. Denno</u> , 388 U.S. 293 (1967).....	20, 21
<u>United States v. Evans</u> , 484 F. 2d 1178, 1186 (2d Cir., 1973).....	27
<u>United States v. Kahan</u> , 479 F. 2d 290, 294 (2d Cir., 1973).....	23, 27
<u>United States v. Yanishefsky</u> , 500 F. 2d 1327 (2d Cir., 1974).....	21
<u>United States ex rel. Armstrong v. Casscles</u> , 489 F. 2d 20, 23-24 (2d Cir., 1973).....	22
<u>United States ex rel. Birt v. Schubert</u> , 498 F. 2d 1396 (2d Cir., 1974).....	21
<u>United States ex rel. Cummings v. Zelker</u> , 455 F. 2d 714 (2d Cir., 1972).....	22

	<u>Page</u>
<u>United States ex rel. Frasier v. Henderson,</u> 464 F. 2d 260 (2d Cir., 1972).....	22, 23, 27
<u>United States ex rel. Lucas v. Regan, 503 F. 2d</u> (2d Cir., 1974).....	23, 27
<u>United States ex rel. Phipps v. Follette, 428 F. 2d 912</u> (2d Cir., 1970) cert. den. 400 U.S. 908 (1972).....	21, 22, 26
<u>United States ex rel. Robinson v. Zelker, 371 F. Supp.</u> 409 (S.D.N.Y., 1974) affd. 506 F. 2d 923 (2d Cir., 1975) cert. den. ____ U.S. ____ (74-6137), May 12, 1975.....	22, 23

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA ex rel. :
LARRY JULIUS GIBBS, :
Appellant, :
-against- : Docket No. 75-2057
LEON J. VINCENT, Superintendent, :
Appellee. :
-----X

BRIEF FOR APPELLEE

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Questions Presented

1. Whether the record supports the decision of the District Judge that there was an independent basis for the in-court identifications made of appellant?
2. Whether the absence of two witnesses from the pre-trial suppression hearing renders inadmissible their in-court identifications where the order to show cause did not require their production and no objection to their absence or identification was made during or prior to trial?

Statement

In this habeas corpus proceeding, Gibbs appeals from a decision of the United States District Court for the Eastern District of New York (Bartels, J.) rendered October 4, 1974, which denied his claim that pre-trial identification procedures used by the police so tainted the in-court identifications of eyewitnesses to the crime that such identifications should have been suppressed and that in any event the in-court identifications of two eyewitnesses should have been suppressed because they did not testify at the pre-trial suppression hearing.

Statement of Facts

A. The Crime

At about 6:45 p.m. on March 8, 1967, two men entered Nuclear Drive-in Cleaners. They knocked on the counter and Mr. Bleck, the president, went over to them. One of the men asked him for change of ten dollars. After Mr. Bleck said he did not have it Larry Gibbs pulled out a gun (H-5) (T-23).^{*} Gibbs said, "This is a stickup and I want all the money" (H-6) (T-24). Mr. Bleck replied, "You will get all the money, I don't want anyone to get hurt" (H-6) (T-24). Mr. Bleck took the money out of the

^{*}"H-" refers to pages of the Hearing on Identification. "T-" refers to the minutes of the trial held September 11, 12, 13, 16 and 17, 1968.

cash register (H-6) (T-26, 138, 174). At this time Margaret Perry was near Mr. Bleck, about eight feet away (T-27). When one of the men banged on the desk Bleck came over and said, "It's a stickup" (T-136). There was also a young man in the vault, Mr. Alston (T-27). When Mr. Bleck took money from his pockets and gave it to the men, he had about \$120.00 in his pockets (T-28). The men took over \$300.00 from the cash register (T-29). They also took some \$60.00 from a petty cash drawer (T-29). Mr. Alston came out of the clothing vault and stood about nine feet from Mr. Bleck (T-30, 31) and ten feet from the two men (T-177). The two men then left. As they were leaving a car pulled up in front of the store (T-32), and a customer who was a police officer came in (T-33, 138, 175). Mrs. Perry yelled out, "These two fellows just held us up" (T-33, 138). The officer pulled out his gun and fired two shots (T-33, 139, 175).

Mr. Bleck ran to the phone and called the police (T-34). A detective responded immediately. From the time appellant said "I want service" until Mr. Bleck gave him the money in the register, about one minute passed (T-52).

B. The Identification

After Bleck gave the police a description of the robbers, the victims were shown a book containing forty to fifty

photographs of black men (H-9, 30, 31, 49, 50). Bleck selected a photograph of appellant (H-10). This was at approximately 6:55 (H-10). Perry didn't give a description but told the detective that she would know the robbers if she saw them (T-157). The three victims were then taken to the police station where they were shown another book containing several hundred photographs (H-35, 50-51). A photograph of appellant was again selected (H-10, 11, 35).

The photograph selected in the store was not placed in the book shown to the victims at the police station (H-35).

About six days after the crime, on the day of appellant's arrest, Bleck, Perry and Alston went to the police station (H-12, T-91, 158, 187) and were asked to make an identification. They looked into a room through a window. In the room was appellant, his Mother, Father and a white police officer. Appellant was identified by them as one of the robbers (H-13, T-161, 190). Before Perry identified appellant, she had seen Bleck at the station house. He said he was sorry she had had to get out of bed at that time of night. He said nothing else (T-160). No photograph of the other robber was ever identified.

C. The Suppression Hearing on Identification

On January 29, 1968 a pre-trial suppression hearing was held.

Sam Bleck testified that he was the President of Nuclear Drive-in Cleaners located at 192-10 Linden Boulevard, Queens (H-4).

At about 6:45 p.m. on March 8, 1967, two men entered his store. They knocked on the counter and Mr. Bleck went over to them. One of the men asked him for change of ten dollars. After Mr. Bleck said he did not have it, Larry Gibbs pulled out a gun (H-5). Gibbs said, "This is a stickup and I want all the money" (H-6). Mr. Bleck replied, "You will get all the money, I don't want anyone to get hurt" (H-6). Mr. Bleck took the money out of the cash register (H-6). A customer drove up to the store. The two men left the store (H-8). Mr. Bleck immediately called the police (H-9).

Shortly thereafter, several police officers arrived. Detective Adelson showed Mr. Bleck several photographs (H-9). This group of photographs contained forty or fifty pictures (H-30). This was at about 6:55 p.m. (H-10). He selected a picture of the defendant. He then went to the police station and looked at several hundred different pictures (H-10, 35) in a book (H-11), from which he selected a picture of Larry Gibbs, the defendant (H-11).

About six days later, at 10:30 p.m., he went to the police station and looked into a room. He was asked to identify someone in there (H-12). In the room was Larry Gibbs, a man and

a woman. All three were Negro. There was also a white police officer (H-13).

No line-up was held at the police station (H-42).

Detective Morton Adelson testified that on March 8, 1968, at about 6:45 p.m., he was informed that a robbery had occurred at Nuclear Cleaners. He went to the store where he met Mr. Bleck (H-49). He showed him a series of photographs (H-50). Afterwards, he asked Mr. Bleck to go to the 105th Squad office to view other photographs (H-50). There were a "few hundred photos" shown to Mr. Bleck at the squad office (H-51).

On March 14th, at approximately 11:00 p.m., after Gibbs' arrest, Mr. Bleck came to the police station (H-52). The photograph selected in the store was not placed in the book shown to Mr. Bleck at the police station (H-53).

On March 14th, Detective Adelson went to the defendant's house along with Detectives Gilroy and McDermott (H-54) and was told by Mrs. Gibbs that Larry was playing basketball. Two of appellant's sisters went to get him. About five or ten minutes later, Larry and his twin brother came home (H-56). Garry Gibbs entered first (H-57). Larry entered next, was placed under arrest (H-58), and was taken to the police station with his parents (H-62).

Julia Gibbs, appellant's Mother, testified that Larry Gibbs has a twin brother, Garry (H-69). On March 14, 1967, Detective Adelson and two other detectives came to her home to see her sons (H-70).

She was asked where her sons were, and to call them (H-70). Two of her daughters went to get them (H-71). Garry, appellant's brother, entered and one of the detectives grabbed him and shoved him against a china closet. The Gibbs' told the detectives that they had Garry, not Larry (H-72). Larry then came in (H-72).

Detective Adelson said, "We can handle all this better if we go down to the precinct, we just want to ask him a few questions" (H-73).

Mr. and Mrs. Gibbs and one of their daughters went to the police station with appellant (H-73). Detective Adelson told Mrs. Gibbs not to get a lawyer (H-74). Mr. and Mrs. Gibbs, their daughter, and appellant were in a room. Larry Gibbs was told to stand in front of a window (H-77).

Garry Gibbs testified that on March 14, 1967 (H-79), his sister came to him at the Community Center, after which he went home (H-80). When he entered the house, a police officer grabbed him by the arm and threw him against the china closet

and said, "I got Larry, I got Larry" (H-30). Mrs. Gibbs then told the officer that this wasn't Larry. Larry came in later, (H-81).

Larry Gibbs, testified that on March 14, 1967 he entered his house and upon seeing a police officer holding his brother Garry by his arm (H-85), told him, "My name is Larry" (H-86). Appellant was told to go to the police station (H-87). He was taken into a room and sat in front of a window (H-88).

Detective Adelson was called by the defendant and testified that only one of the men who committed the crime was selected by photograph, that the other man was never identified (H-93). Mrs. Gibbs never mentioned a lawyer in her home on March 14th, but mentioned an attorney at the police station (H-94). Detective Adelson never grabbed Garry Gibbs nor did he see anyone else do it (H-98).

Detective Adelson was again recalled, by the court, and testified that on the night of the arrest, Larry Gibbs was wearing "a black pea jacket, black and white shirt, black pants." He did not remember what Garry Gibbs was wearing (H-107).

Larry Gibbs, the defendant, was recalled by the defense and testified that when arrested on March 14, 1967, he was wearing a long green tweed jacket (H-112). Before going to the police

station, he put on a leather jacket belonging to his brother.

Garry Gibbs, recalled, testified that on March 14th he was wearing a black leather jacket and lent it to his brother (H-116).

After the hearing, the motion to suppress was denied (H-118). The Court noted that at the hearing, Larry and his brother were dressed exactly alike, which presented a different situation from that at the stationhouse (H-117).

Defense counsel's order required the production of the complainant, Bleck. The pre-trial identifications of Perry and Alston were illuminated during the hearing (H-9, 31, 35, 50-51). However there was never a further order requiring their production nor was an objection to their absence made by the defense. Defense counsel assumed the testimony adduced covered the other witnesses (H-120).

D. The Trial

1. The People's Case

Sam Bleck testified that he was the President of Nuclear Drive-In Cleaners Incorporated, located at 192-10 Linden Boulevard in Queens (T-21). On March 8, 1967 at about 6:45 p.m. while he was packing some shirts, two men entered and knocked on the counter.

One of them said, "I want service." (T-23). Mr. Bleck went to the counter to speak to them. One of the men asked, "Do you have change of ten dollars?". Mr. Bleck said no. Larry Gibbs then pulled out a revolver and said, "This is a stick-up," and "Give me the money." (T-24).

Mr. Bleck told the men that he would do as they wished so that no one would get hurt (T-24). The other man then pulled a gun. Bleck opened the register and placed it on the counter (T-25, 26). At this time Margaret Perry was near Mr. Bleck, to his left, about eight feet away (T-27). There was also a young man in the vault, about ten to fifteen feet to Bleck's right (T-27, 28). Mr. Bleck also took money from his pockets and gave it to the men. He had about \$120.00 in his pocket (T-28), and over \$300.00 in the cash register (T-29). They also took some \$60.00 from a petty cash drawer (T-29). Dave Alston then came out of the vault (T-30) walked a few feet and remained standing about nine feet from appellant (T-31).

As the two men left, a car pulled up in front of the store (T-32). A customer who was a police officer came in, passing the two men (T-33). Mrs. Perry yelled out, "These two fellows just held us up" (T-33). The officer pulled out his gun and fired two shots (T-33).

Mr. Bleck then ran to the phone and called the police

who arrived one minute later (T-34). Mr. Bleck identified Larry Gibbs, as one of the two men who held him up (T-35).

On cross-examination Mr. Bleck testified that prior to March 8, 1967 he had never seen Larry Gibbs (T-35). On March 8, 1967, anywhere from 50 to 150 people entered Mr. Bleck's store (T-40). He described the gun used by appellant as small with white painting on the barrel (T-48). The gun used by the other man was larger (T-49). From the time the defendant said "I want service", until Mr. Bleck gave him the money in the register, about one minute passed (T-52). Mr. Bleck could not at the trial recall the description he had given of appellant or the relative height and weight of the two men (T-68, 70). He wears glasses for driving since he had difficulty seeing objects at a distance (T-73-75). Bleck agreed that he originally described the two men as Negroes, one of whom was 20 years of age, six feet tall and 175 pounds. The other man, he had described, was 5 feet nine inches tall, 25 years old, and weighed 185 pounds. Bleck said the latter description was that of Gibbs (T-84-86).

At about ten thirty or eleven o'clock in the evening on March 14, 1968 Mr. Bleck went to the police station by himself having been requested to do so (T-91). At the stationhouse Mr. Bleck was directed to a window. He looked through it and saw four people inside a room (T-93). Three were Negro and one white (T-94).

Only one Negro was between fifteen and twenty-five years of age (T-94). Bleck could not recall his estimation of the age of the person he saw through the window (T-95). The court recessed, warning the jury to stay away from Nuclear Dry Cleaners (T-98). When Bleck returned to the stand he said he had "no doubts whatsoever" as to his identification of Gibbs (T-121).

Before Margaret Perry was called to the stand, defense counsel indicated that Mrs. Perry had not testified at appellant's first trial and asked that appellant's brother, Garry be seated at counsel table during her testimony (T-127). He also asked that an alibi witness be permitted to sit at counsel table (T-128). He indicated he wanted this procedure followed only during Mrs. Perry's testimony (T-129-130). His motion was denied (T-133) and Mrs. Perry was called to the stand.

Mrs. Perry testified that she had been employed at Nuclear Cleaners. On March 8, 1967 there was a robbery between 6:45 and 7:00 p.m. (T-135). She saw two men come in. One banged on the counter; Bleck approached them and they said "It's a stickup." Both men had guns. She was about 17 feet away from them and heard them ask for change and then say, "This is a holdup" (T-136). The phone rang and she answered it (T-136-137). Mr. Bleck was then two feet from the men (T-137). She saw the men take money out of the register and saw Bleck give them money from

his pocket (T-138). The two men then left. A policeman came in and Mrs. Perry told them there had been a stickup. The policeman ran behind them and fired two shots (T-138-139). She identified Gibbs as one of the men who had robbed the store (T-141). She had no doubt as to her identification (T-142).

On cross-examination Mrs. Perry testified that she didn't wear glasses (T-142). The telephone call was from her daughter. She didn't speak to her daughter, but hung up saying she would call back (T-149). While on the phone, Mrs. Perry was about 12 feet from appellant (T-152). Her back was not facing appellant. As she walked from the phone back to the marking table she could still see them (T-153-154). It took 35 seconds for Mr. Bleck to give the men money from the register and from his pocket (T-155). Mrs. Perry did not give the police a description but told them she would know them if she saw them (T-157). She didn't notice their weight or unusual characteristics (T-158).

On March 14, 1967 she went to the 105th Precinct to "make an identification" (T-158). She was told to look in a window and saw the defendant (T-161). She did not remember how many other persons were in the room (T-161).

Defense counsel requested that appellant's brother and brother-in-law be produced. The two men were told to face the jury and the witness, Perry. Perry was still able to identify

appellant, stating, "They all look different." (T-165-169).

David Alston testified that on March 8, 1967, he was employed by Nuclear Cleaners at 192-10 Linden Boulevard in Queens County (T-172). There came a time on March 8, 1967 when Mr. Alston came out of a clothing vault and saw two men telling Mr. Bleck that "It was a holdup" (T-173). Each man had a gun (T-173, 174).

Mr. Bleck gave them money from the cash register or drawer as well as from his pocket (T-174). When they had the money the two men left. Another man entered and Mrs. Perry told him what had happened. He chased them and fired two shots (T-175). Alston identified Larry Gibbs, as one of the two men who held up Mr. Bleck (T-175-176). Alston had been standing about 10 feet from the men during the robbery (T-176). His observation lasted a few minutes (T-184). On March 14, 1967 Mr. Alston went to the police station (T-187). He looked through a window and saw three people, only one of whom fitted the description of either of the hold-up men.

Detective Morton Adelson testified that on March 8, 1967 at about 6:50 p.m., he responded to Nuclear Drive-in Cleaners at 192-10 Linden Boulevard in Queens County and spoke to three people (T-195, 196). On March 14, 1967 he arrested Larry Gibbs (T-196).

On cross-examination, Detective Adelson testified that when he arrested Gibbs at Gibbs' house, he was accompanied by Detectives Gilroy and McDermott. They arrived at appellant's house at about 11:00 p.m. Larry Gibbs was not at home when they arrived (T-213). Two of appellant's sisters called him home. He came home about ten minutes later (T-213). Garry Gibbs, appellant's twin brother, came in first, then Larry came in (T-213).

Detective Adelson took the defendant and his parents to the police station (T-214). No line-up was held (T-216).

2. The Defense

Leonard Johnson, eighteen years old, testified that he is married to Deborah Gibbs (T-228), appellant's sister (T-238). On March 8, 1967, Larry Gibbs and his brother Garry Gibbs, came to his house at about 10:00 a.m. (T-230). Mr. Johnson's father and sister were at home (T-231). Mr. Johnson and the Gibbs brothers played handball and then they went to the Community Action Center to see about a job (T-232). They got to the center at about twelve noon (T-233), signed a sheet and went to see a Mrs. Frazier (T-233). Mrs. Frazier sent Mr. Johnson to 33 Bushwick Place to be interviewed for a job. Larry Gibbs went with him (T-233). They stayed there five or ten minutes and then returned to the center. From there they went to Mr. Johnson's home (T-234),

arriving there at about two o'clock (T-235). They listened to records until 3:30 or 3:45 (T-235). They met other friends and listened to more records until 5:30 p.m. Larry Gibbs did not leave until eleven o'clock (T-236).

John W. Johnson, testified that on the morning of March 8, 1967, Larry and Garry Gibbs came to his home. His son, Leonard Johnson was still sleeping. At about 11:00 a.m. the three boys left his apartment (T-240). At about 2:00 p.m. the boys came home and played records (T-241). He could not recall if Larry Gibbs left the apartment after 5:00 p.m. (T-241). At 11:00 p.m. when he left for work Mr. Johnson was accompanied by Larry Gibbs (T-242). He last saw Larry Gibbs at 11:20 p.m. (T-242).

On cross-examination Mr. Johnson stated that the next day March 9, 1967, his son told him "Larry has been arrested" (T-244).

Julia Gibbs, testified that Larry and Garry Gibbs are twin brothers (T-250). On March 8, 1967 Mrs. Gibbs woke her son Larry at about 7:00 a.m. He left fifteen minutes later. His brother Garry went with him (T-253). She next saw Larry Gibbs, 12:30 a.m. the following morning (T-254).

On March 14, 1967, in the evening some police officers came to her home. The defendant was not at home (T-256). The officers asked for Larry. Mrs. Gibbs sent two of her daughters to call Larry (T-258). Her son Garry came in first. A police

officer grabbed him and said, "I got him. I got Larry." (T-259). The defendant then came in and said "I am Larry." They released Garry (T-260).

Mrs. Gibbs, her husband and a daughter, went with Larry and the police to the police station (T-260). They were all seated in a little room (T-260).

Larry Gibbs testified that on March 8, 1967, he left his house between 8:00 and 8:30 a.m. and went to Mr. Johnson's house. From there they went to "this program on Jackson", signed a paper and spoke to a Mrs. Frazier (T-271, 274).

They returned to Mr. Johnson's house at about 2:00 p.m. The defendant did not leave until 11:00 p.m. and arrived home at 12:30 p.m.

On March 14, 1967, he was playing basketball when he was called home (T-279). When the defendant came in he saw his brother being held by the police against a china closet (T-280). At the police station he was placed in a room that had a little mirror (T-281).

Nicholas DeVito testified that he was a Court Stenographer in the Supreme Court and that at a previous trial on this indictment he made a stenographic record of the testimony of one

Rosa Frazier (T-308). Both parties stipulated to the reading of this testimony in lieu of Mrs. Frazier's actual appearance (T-307).

Mrs. Rosa Frazier testified that she lived in the same building as Leonard Johnson and knew him (T-309). Mrs. Frazier works for an anti-poverty program, the Community Action Center, Number 7 (T-310) and was so employed on March 8, 1967 (T-311). Anyone coming to see her must sign an attendance sheet (T-311). On March 8, 1967 Larry Gibbs, Leonard Johnson and Stanley Robinson came to the center (T-318). On that date she sent Leonard Johnson for a job (T-319). The boys came to her before lunchtime (T-319). Larry Gibbs' name was on the attendance sheet (T-320).

On cross-examination Mrs. Frazier testified that she knew Leonard Johnson for eleven years (T-324). After she sent Leonard Johnson out for a job she did not see him again that day. (T-352).

3. People's Rebuttal

Detective Morton Adelson testified that on the evening he arrested the defendant he did not "take Garry Gibbs' arm and push it behind his back and push him up against the china closet" (T-355), nor did he see any other police officer do this (T-356).

He did not himself strike Garry Gibbs nor did he see any other police officer strike Garry Gibbs.

Appellant was convicted after trial by jury of first degree robbery and was sentenced on October 24, 1968 to an indeterminate term of not less than ten nor more than twenty years.

Prior Proceedings

A. State

Appellant's identification claim was presented to the Appellate Division, Second Department, which affirmed the judgment of conviction, 36 A D 2d 689 (1971); leave to appeal to the New York Court of Appeals was denied on April 1, 1971.

B. Federal

On October 4, 1974, in a detailed, reasoned decision the District Court concluded that appellant's habeas corpus application must be denied since there was no violation of due process.

The decision was premised on the witnesses' observations of appellant during commission of the crime, on their identification of appellant from photographs prior to the show-up, on their certainty of their identification, and on the fact that,

as to Perry and Alston, appellant had never during or prior to his criminal trial, objected to their testimony or absence from the pre-trial suppression hearing.

On October 11, 1974, the District Court denied appellant's application for a certificate of probable cause since "the court believes this appeal to be without merit". The court further denied appellant's application for a rehearing on the grounds of newly discovered evidence.

POINT I

THE PRE-TRIAL IDENTIFICATION
PROCEDURE DID NOT IRREPARABLY
TAINT IN-COURT IDENTIFICATIONS
OF APPELLANT AT TRIAL.

The fact that the pre-trial identification procedure used was unnecessarily suggestive does not alone require the exclusion of in-court identification testimony; the primary concern is with the accuracy of the identification. Neil v. Biggers, 409 U.S. 188 (1972); Stovall v. Denno, 388 U.S. 293 (1967). A violation of due process depends on whether, under the "totality of the circumstances", the witness' identifications of appellant were based on reliable, independent recollections. Neil v. Biggers, supra; Stovall v. Denno, 388 U.S. 293 (1967)

"[T]he factors to be considered in evaluating the likelihood of mis-identification include the opportunity of

the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Neil v. Biggers, supra at 199. See also, U.S. ex rel. Phipps v. Follette, 428 F. 2d 912 (2d Cir., 1970, cert. den. 100 U.S. 908 (1972)).

The policy behind the exclusion of certain identification testimony was articulated by the Court in Stovall v. Denno, supra, at 297:

"A conviction which rests on a mistaken identification is a gross miscarriage of justice."

It is clear that, under the totality of the circumstances, the source of the in-court identifications of appellant in the instant case, was independent of the pre-trial show-up.

A. The identification made by Black

Bleck's observation of appellant lasted for a little more than a minute; well within the factual perimeters of prior identification cases decided by this Court. U.S. v. Yanishefsky, 500 F. 2d 327 (2d Cir., 1974) (momentary viewing of side of appellant's face); U.S. ex rel. Birt v. Schubert, 498 F. 2d 396 (2d Cir., 1974) (Brief viewing of fleeing robber by 14 year old

narcotics addict); U.S. ex rel. Armstrong v. Casscles, 489 F. 2d 20, 23-24 (2d Cir., 1973) (1 minute observation); U.S. ex rel. Cummings v. Zelker, 455 F. 2d 714 (2d Cir., 1972) (15 second observation); U.S. ex rel Robinson v. Vincent, 371 F. Supp. 409 (S.D.N.Y., 1974) affd. 506 F. 2d 927 (2d Cir., 1974) cert. den. ____ U.S. ____ (74-6137, May 12, 1975) (7 to 10 second observation). In U.S. ex rel. Phipps v. Follette, supra, this Court upheld an in-court identification by a victim who observed his attacker for 20 or 30 seconds despite a "show-up" only an hour after the crime. See also, U.S. ex rel. Frasier v. Henderson, 464 F. 2d 260 (2d Cir., 1972).

Further, Bleck was motivated to observe the criminal carefully "to seek out and retain [the] image" of his face, since he was the victim, not merely an observer of the crime. Neil v. Biggers, supra at 200; U.S. ex rel. Phipps v. Follette, supra at 915.

On the very day of the crime Bleck was shown a book containing photographs of 40 to 50 black men. While he was unable to identify the other robber, Bleck was sure of his selection of appellant's photograph. Later at the police station he again identified a photograph of appellant from a book containing several hundred photographs. The fact that Bleck could easily identify a photograph of appellant while never identifying a photograph of

the other robber indicates that he was indeed a most reliable witness.

His description of appellant was reasonably accurate. He described appellant as being 25 years old, 185 pounds, and 5'9" tall. At the time of trial appellant was indeed 5'9" tall, but was 17 years of age and weighed about 140 pounds. The discrepancies in Bleck's description are hardly material in view of his immediate identification of appellant from a photographic display only a few minutes after the crime. Thus, they fail to give rise to a substantial doubt as to whether the image formed by Bleck at the time of the crime was sufficiently accurate to provide a basis independent of the show-up for his in-court identification. Bleck's ability, just minutes after the crime, to select appellant's picture first from a display of 40 to 50 black men, and then again from a book containing several hundred pictures, demonstrates conclusively that Bleck was able to identify appellant through his encounter at the scene of the crime, rather than at the police station.

The show-up occurred only six days after the crime and thus certainly could not have refreshed Bleck's vivid recollection of appellant. See U.S. ex rel. Lucas v. Regan, 503 F. 2d (2d Cir., 1974); U.S. v. Kahan, 479 F. 2d 290, 294 (2d Cir., 1973); U.S. ex rel. Frasier v. Henderson, supra; U.S. ex rel. Robinson v. Vincent, supra. In this case Bleck's identification

of appellant at the show-up served to confirm his prior identification not to taint his subsequent identification at trial.

Lastly, Bleck's identifications of appellant at the show-up and at the trial were without hesitation.

It is thus clear, that Bleck had already formed such a definite image of appellant in his mind that his in-court identification of appellant was reliable and accurate regardless of the impropriety of the pre-trial show-up.

B. The Identifications of Perry and Alston

The identifications by Perry and Alston were based on the same procedure as was Bleck's. They, too, were victims of the robbery and had a high motivation to observe appellant. Indeed Perry testified that when one of the robbers banged on the counter, Bleck went over and said it's a stick-up. Both men had guns, and the presence of these weapons intensified her fear so that she failed to notice distinguishing marks or characteristics about them. She saw the robbers taking money from the cash register and saw Bleck give them money from his pockets. When a policeman entered the store as the robbers departed, it was Mrs. Perry who told him what happened. After identifying appellant from the photographic display viewed by Bleck, Perry later went to the police station to "make an identification". She was told

to look in a window and saw appellant. She didn't remember how many others were in the room with him.

At trial appellant's fraternal twin brother and one Leonard Johnson stood before her. She identified appellant as one of the two robbers and had no doubt about her identification.

Alston, who was in a clothing vault when the robbery commenced, came out to see two men, with guns, telling Bleck that "It was a holdup." He saw Bleck give money from the register and from his pocket. He was about 10 feet away and observed the two men for a few minutes.

While their opportunity to observe appellant was brief, it is well recognized that a brief view by a victim of crime is often more reliable than an extended view by a casual bystander. Their ability to identify appellant from several hundred photographs demonstrates the reliability of their identification. Indeed Perry was able to identify appellant even when confronted by his fraternal twin as well as his brother-in-law. All pre-trial identifications of appellant occurred far closer in time to the crime than to the trial. Thus there is no reason to conclude that the image formed by the witnesses resulted from identification procedures rather than the crime itself. See U.S. ex rel.

Phipps v. Follette, supra.

No objection was made at trial to their identification of appellant. Moreover, in view of the certainty of Bleck's identification, there is no substantial basis here for contending that appellant's conviction rested on a mistaken identification, the evil which the exclusion of particular in-court identifications seeks to remedy. The testimony of Perry and Alston was merely cumulative and even assuming, arguendo, that the admission of their in-court identifications was error, such was harmless beyond a reasonable doubt. Schneble v. Florida, 405 U.S. 427 (1970); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

The trial court's refusal to permit appellant's fraternal twin brother to sit at the counsel table during the pre-trial suppression hearing and during trial hardly constitutes reversible constitutional error. Garry Gibbs testified at the suppression hearing permitting the trial court to make a comparison between the two brothers. Great weight must be given to the determination of the judge who saw and heard the witnesses. U.S. ex rel. Phipps v. Follette, supra. Moreover, the similarities or differences in the appearance of the two brothers at the time of the hearing or at trial is irrelevant. What is important is the ability of the witnesses to identify appellant the day of the

crime and again six days later, in the case of Mrs. Perry, even when confronted by Garry Gibbs and Leonard Johnson at trial.

The result of any witness' observation need not be absolute certainty; it is sufficient if he had an opportunity of personal observation enough to see general features and get some impression from these observations. U.S. v. Evans, 484 F. 2d 1186 (2d Cir., 1973). In court identifications, following "show-ups" have been found properly admitted by this Court even where a witness failed to identify the criminal from photographs (U.S. v. Kahan, supra) or identified the criminal from a single photograph display (U.S. ex rel. Frasier v. Henderson, supra).

The in-court identifications of appellant, in the instant case, did not violate due process. Prior descriptions, identifications and the opportunity to observe the criminal at the scene and time of the crime are factors affecting credibility which the defense was entitled to raise to the jury. The ability of the defense to cross-examine all identifying witnesses adequately insured the accuracy of their identifications. U.S. ex rel. Lucas v. Regan, supra.

The evidence in the instant case reveals that there was not "a very substantial likelihood of irreparable misidentification". Simmons v. United States, 390 U.S. 377, 384 (1968), and it is the likelihood of misidentification, not the suggestiveness of

pre-trial confrontation, which violate a defendant's right to due process. Neil v. Biggers, supra at 198.

POINT II

THE ADMISSION OF IDENTIFICATION
TESTIMONY BY PERRY AND ALSTON,
WHO DID NOT TESTIFY AT THE
SUPPRESSION HEARING WAS NOT
CONSTITUTIONAL ERROR.

Appellant claims that the in-court identifications of Perry and Alston were inadmissible simply because they were not produced at the pre-trial suppression hearing. The simple answer to this claim is that prior to Gilbert v. California, 388 U.S. 263 (1967) a defendant had no constitutional right to such a procedure.

Appellant contends that the fact that he requested an order suppressing only the identification of the complaining witness is of no consequence since he had no way of knowing that other persons would be called to identify him at trial. This is sheer nonsense. The photographic and show-up identifications of Perry and Alston were brought out during the testimony at the pre-trial hearing, yet the defense never requested an order to require their production and testimony. No objection was made by the defense to their absence. It is apparent that since the testimony at the hearing indicated that all three witnesses

had been subjected to the same pre-trial identification procedures, the defense concluded that the testimony given disposed of the issues related to its propriety. No objection to their identification testimony at trial was made by the defense in order to preserve the issue for review on direct appeal.

Nor during the trial did appellant request that he be permitted to voir dire these two witnesses outside the presence of the jury. It is clear that he deliberately chose to attempt to discredit these witnesses through cross-examination rather than to attack the admissibility of their identifications.

By refusing at any time prior to appeal to make any objection to the in-court identifications of Perry and Alston in the face of their absence from the suppression hearing, the trial judge was not given the opportunity to conduct the trial as appellant would have liked. Henry v. Mississippi, 379 U.S. 443 (1965). In any event, the admission of their testimony did not violate appellant's right to due process, since under the totality of the circumstances, their in-court identifications were reliable and not based on a suggestive pre-trial confrontation.

CONCLUSION

THE JUDGMENT OF THE DISTRICT
COURT SHOULD IN ALL RESPECTS
BE AFFIRMED.

Dated: New York, New York
July 18, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RIIONDA AMKRAUT BAYER
Deputy Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

CONSTANCE TREZZA , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellee
herein. On the 18th day of July , 1975 , she served
the annexed upon the following named person :

PHYLIS SKLOOT BAMBERGER
Attorney for Appellant
The Legal Aid Society
United States Courthouse
Foley Square
New York, New York 10007

Attorney in the within entitled proceeding by depositing
three correct copies
a true and ~~correct copy~~ thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by her for that
purpose.

Constance Trezza

Sworn to before me this
18th day of July , 1975

Charles Ambrose Say
Assistant Attorney General
of the State of New York